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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE THIGPEN,

Defendant and Appellant.

C083699

(Super. Ct. No. 07F04369)

Defendant Clyde Thigpen was sentenced to serve an indeterminate life term in prison under the three strikes law. He petitioned for resentencing under the Three Strikes Reform Act of 2012 (as approved by voters, Gen. Elec. Nov. 6, 2012, eff. Nov. 7, 2012) (the Act). (See Pen. Code, § 1170.126.)¹ The trial court denied the petition upon finding resentencing posed an unreasonable risk of danger to public safety. On appeal, defendant contends (1) the trial court abused its discretion in denying the petition and (2) on remand

¹ Undesignated statutory references are to the Penal Code.

for resentencing, the trial court should be directed to consider whether to strike either of his two prior serious-felony enhancements. We conclude the trial court did not abuse its discretion. Based on this conclusion, defendant's second contention is moot. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, a jury found defendant guilty of assault with a deadly weapon and assault with force likely to inflict great bodily injury. (§ 245, subd. (a)(1).) Because defendant had incurred two prior strike convictions, the trial court imposed an indeterminate term of 35 years to life in prison on the first count and a concurrent term of 25 years to life on the second count.

In 2013, defendant filed a petition to recall his three-strike sentence under the Act. The trial court denied the petition on the ground defendant's current strike conviction of assault with a deadly weapon precluded resentencing on his current nonstrike conviction of assault with force likely to inflict great bodily injury. This court affirmed the ruling in an unpublished opinion. (*People v. Thigpen* (Dec. 22, 2014, C074281 [nonpub. opn].) Following the California Supreme Court's holding that a current strike conviction does not preclude resentencing on a concurrent nonstrike conviction, defendant filed a second petition to recall his sentence.

The People again opposed resentencing, arguing that defendant was both statutorily ineligible and unreasonably dangerous. The People summarized the pertinent facts of the offense as follows: "[T]he defendant punch[ed] the victim in the face about four times knocking her to the ground [citation]. He [Count One] then drove his car down an alleyway at the victim causing her to climb onto a fence [citation]. While victim was on the fence, defendant backed his car up and drove it toward her several times while revving the engine [citation]." The People provided a chronology of defendant's criminal adjudication history:

“April 18, 1975[:] Defendant arrested in Los Angeles for burglary, possession of stolen property, petty theft and tampering with a vehicle – no additional facts available. Disposition: The defendant was convicted of a misdemeanor violation of [] section 485.

“October 18, 1979[:] Defendant arrested for discharging a firearm at an inhabited dwelling and assault with a deadly weapon in Los Angeles – no additional facts available. Disposition: The defendant was convicted of a violation of [] section 246 and sentenced to four years in state prison. (Prior conviction # 1)

“June 22, 1984[:] On September 10, 1983, Oakland Police received multiple calls about gunshots being fired. Someone knocked on victim’s door and when he opened it two men were standing by a car. He recognized one of them as defendant. When the victim went back in the house he heard several more gunshots. Defendant matched the description provided and was identified by the victim. Disposition: Convicted of [section] 32 and sentenced to 16 months in state prison.

“October 12, 1986[:] Defendant arrested in Fairfield for resisting arrest, fighting in public and battery. No further information available. Disposition: Convicted of a violation of [] section 415 and sentenced to twelve months of probation.

“March 16, 1989[:] Defendant arrested for transportation of Cocaine Base in Sacramento. No further information available. Disposition: Convicted of a violation of Health and Safety [C]ode section 11352(a) and sentenced to five years in state prison.

“March 16, 1989[:] Defendant arrested for carrying a loaded firearm, battery on a peace officer and being a felon in possession of a firearm in Sacramento. Disposition: Convicted of a violation of [] section 243(c) and sentenced to eight months consecutive in state prison. (Prior Conviction # 2)

“July 9, 1992[:] Defendant arrested for being a felon in possession of a firearm, carrying a concealed firearm[,], possession of rock cocaine for sale and transportation of rock cocaine in Sacramento. Disposition: Convicted of a violation of [] section 12021(a) and sentenced to five years in state prison.

“June 30, 1995[:] Defendant arrested for possession of a controlled substance and parole violation. Disposition: Convicted of a violation of Health and Safety [C]ode section 11350(a) and sentenced to two years in state prison.

“August 7, 1997[:] Defendant arrested for being a felon in possession of firearm and possession of stolen property in Sacramento. Disposition: Convicted of a violation of [] section 12021(a) and sentenced to two years in state prison.

“October 26, 1998[:] Defendant arrested for being in possession of a controlled substance and resisting arrest in Sacramento. Disposition: Convicted of a violation of [H]ealth and Safety Code section 11350(a) and sentenced to 16 months in state prison.

“November 29, 2000[:] Defendant arrested for possession of rock cocaine for sale, bringing a controlled substance inside a jail and a violation of parole in Sacramento. Disposition: Convicted of Health and Safety Code section 11351.5 and sentenced to five years in state prison.

“September 17, 2004[:] Defendant arrested for Assault likely to produce great bodily injury, battery, and mayhem and parole violation. According to the probation report the defendant attacked a male victim with a garden hoe cutting off part of one of the victim’s fingers. Disposition: Convicted of a violation of [] section 245(a)(1) and sentenced to four years in state prison.”

Turning to defendant’s criminal history and conduct while incarcerated, the People stated that in 2011, “defendant was involved in a fight with his cellmate and received a 115 violation. This violation resulted in the defendant losing 61 days of credit.”

After a contested hearing, the trial court found defendant statutorily eligible for resentencing on his nonstrike offense. But the court exercised its discretion to deny the petition upon finding that resentencing defendant posed an unreasonable risk to public safety. The court reasoned: “I am persuaded that [defendant’s] record is incredible. . . . These are – some of these are very serious crimes. Shooting at an inhabited dwelling, that’s a big deal. Frequent ex-con with a gun, 12021, I bet there’s four or five of those. Assaulting an officer, resisting an officer. . . . And this dispute with his girlfriend led to him trying to run her down and then – I mean punching her and then chasing her in the car and even trying to hit her while she was on a fence. But, of course, that crime he’s received the 35 years to life for, which is appropriate.” The court found defendant “a repeat offender in a very classic sense” and further found “frequently he’s armed and occasionally he’s violent.” The court concluded, addressing defendant, “I’m not recalling your sentence and resentencing you, because I do consider you a very dangerous person who could do violence and use firearms and harm more people.”

DISCUSSION

I

Resentencing Determination

Defendant contends the trial court erred in determining that resentencing him would pose an unreasonable risk to public safety. Specifically, he claims the People failed to present sufficient evidence of his prior convictions or other sufficient evidence to support a finding he poses an unreasonable risk of danger to public safety. We disagree.

Following the passage of the Act, a defendant convicted of a felony with two or more prior strike allegations is subject to a 25 year to life sentence if the current conviction is a serious or violent felony but is subject only to a two-strike sentence if the current felony is not serious or violent. (§§ 667, subd. (e)(2)(A), (C),

1170.12, subd. (c)(2)(A), (C); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 170.) Section 1170.126 allows a person presently serving a three-strike sentence for a felony that is neither serious nor violent to petition for resentencing as a second strike offender subject to certain disqualifying exceptions not relevant here. (§ 1170.126, subds. (a), (e).) If the prisoner is not subject to one of the disqualifying factors, then the trial court shall resentence him or her under the two-strike provision “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

Section 1170.126 vests the trial court with discretion to determine whether resentencing the defendant poses an unreasonable risk of danger to public safety. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) “[O]nce a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence.” (*Id.* at p. 1305.) In exercising its discretion in determining whether resentencing would pose such a risk, “the court may consider: [¶] (1) The petitioner’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner’s disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (g).) We review the trial court’s decision for abuse of discretion. (*People v. Williams* (2018) 19 Cal.App.5th 1057, 1062.) Our review is thus limited to whether the ruling “exceeds the bounds of reason or is arbitrary, whimsical or capricious. [Citations.] This standard involves abundant deference to the trial court’s rulings.” (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)

Defendant argues the People's list of his many prior convictions provided "minimal information beyond the charges at arrest and the disposition." Defendant's assertion that "[t]he People in this case relied on [defendant's] record of arrests rather than his record of convictions" is inaccurate. The People listed all of defendant's arrests *and* convictions. While he focuses on the lack of factual background for some of the older convictions, the court was entitled to draw reasonable inferences from the record of convictions, including the existence of facts necessary to support those convictions. (*People v. Henley* (1999) 72 Cal.App.4th 555, 561 ["A trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction and served a prison term"]; but see *People v. Delgado* (2008) 43 Cal.4th 1059, 1066 ["[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense"].)

Defendant's extensive record of convictions includes multiple crimes of violence such as discharge of a firearm at an inhabited dwelling (§ 246), battery on a peace officer (§ 243, subd. (c)), assault with a deadly weapon (§ 245, subd. (a)(1)), and two separate convictions for being a felon in possession of a firearm (§ 12021, subd. (a)). This summary of defendant's criminal record is supported by substantial evidence in the record, including the probation report submitted at sentencing of his current offenses and the report of his criminal history generated by the California Law Enforcement Telecommunication System. Accordingly, the court did not simply consider "[r]aw arrest data" as defendant claims. The existence of the individual convictions, the dates they occurred, and the resulting sentences were uncontested. Further, defendant's behavior in prison is consistent with his violent criminal past, showing a fight with his cellmate that resulted in discipline. Additionally, the trial court properly considered the facts underlying defendant's most recent convictions for assault with a deadly weapon and

assault with force likely to inflict great bodily injury, in which he repeatedly punched his girlfriend in the face and tried to run her over with a car. In sum, there is sufficient evidence in the record to support the trial court's finding that defendant poses an unreasonable risk of danger to public safety.

Defendant also contends the People should have presented other evidence outside of his criminal record and in custody violation, such as his California Department of Corrections and Rehabilitation's (CDCR) risk assessment profile. He relies on *People v. Valencia* (2017) 3 Cal.5th 347, which is inapposite, to support this proposition. There, our high court quoted the statutory factors the court must consider for resentencing under Proposition 47, noting they are identical to those under the Act. (*Valencia*, at p. 409.) The Supreme Court listed the factors the court considers in making its own assessment of risk to public safety that include the petitioner's prior criminal history, disciplinary record while incarcerated, and any other factors the court deems relevant. (*Ibid.*; see § 1170.126, subd. (g).) *Valencia* does not mention CDCR risk assessments nor does it require the court to consider them. CDCR risk assessments, while useful to determine appropriate prison housing, may not be as useful to evaluate a defendant's risk of danger to the public outside of prison. Regardless of whether a trial court may deem that information relevant and choose to consider it in its discretion, it is certainly not required to do so.

Defendant's remaining contentions are meritless. He complains that during the hearing, the prosecutor misstated the range of his prison terms as between "two to six years" when his longest sentence was in fact five years eight months. Defense counsel corrected this estimate during the hearing. He complains the prosecutor argued that defendant's previous sentences were shorter than they should have been. The trial court found that argument speculative. Defendant complains the court mistakenly estimated he was charged with being a felon in possession of a gun four or five times when there were

two such convictions. Defendant fails to show these comments were reversible error. Indeed, defendant cites no authority and makes no argument connecting these comments to the court's ruling or the abuse of discretion standard. We reject such claims that are perfunctorily asserted without argument. (See *People v. Williams* (1997) 16 Cal.4th 153, 206.)

In light of defendant's extensive criminal record and prison disciplinary record, evidencing a high rate of violent recidivism and failed efforts at rehabilitation, the trial court's determination was not arbitrary, whimsical, or capricious. We conclude it was not an abuse of discretion for the trial court to deny his petition on the grounds of unreasonable risk of danger to public safety.

II

*Senate Bill 1393*²

In supplemental briefing, defendant contends that on remand for consideration of resentencing pursuant to the Act, we should direct the trial court to exercise its discretion whether to strike a prior serious felony enhancement pursuant to section 667, subdivision (a). The Attorney General responds that defendant's claim is unripe and should be dismissed because it is based on hypothetical future events rather than an appealable order. As we have concluded, defendant is not entitled to a remand for another resentencing hearing because the trial court properly exercised its discretion in declining to resentence him. Accordingly, this contention is moot.

² Senate Bill 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019 (Stats. 2018, ch. 1013, §§ 1–2), amends sections 667, subdivision (a) (Stats. 2018, ch. 1013, § 1), and 1385, subdivision (b) (Stats. 2018, ch. 1013, § 2), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes.

DISPOSITION

The judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
MAURO, Acting P. J.

_____/s/
KRAUSE, J.